IN THE

MISSOURI SUPREME COURT

STATE EX REL. ZANE VALENTINE, Relator, vs. THE HONORABLE MARK ORR, CIRCUIT JUDGE, 38TH JUDICIAL CIRCUIT, Respondent.	)	Cause No. SC92434

ORIGINAL PETITION FOR WRIT OF MANDAMUS IN THE MISSOURI SUPREME COURT FROM THE CIRCUIT COURT OF TANEY COUNTY, MISSOURI THE HONORABLE MARK ORR, CIRCUIT JUDGE

RELATOR'S STATEMENT, BRIEF, AND ARGUMENT IN SUPPORT OF HIS PERMANENT WRIT OF MANDAMUS

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JURISDICTIONAL STATEMENT

The action is one involving Relator's request for an original writ of mandamus, staying proceedings in the underlying cause, *State v. Zane Valentine,* Case No. 10AF-CR02140-01, Circuit Court of Taney County, on the grounds that Respondent did not have the authority to deny Relator probation since more than one hundred twenty days had passed from Relator's sentencing when Respondent denied Relator probation and thus the proceedings of January 19, 2012, denying Relator probation, are a nullity. Therefore, jurisdiction lies with this Court pursuant to Missouri Supreme Court Rules 84.22 and 94.01.

No petition for the relief requested has been made to any higher court.

Relief was sought from, and denied by, the Missouri Court of Appeals, Southern District, in Case No. SD31887, on March 7, 2012.

STATEMENT OF FACTS

On June 9, 2011, Relator pled guilty to one count of child molestation in the first degree and three counts of statutory sodomy in the second degree.[1] (Exhibit A, p. A6; Exhibit H, pp. A37-A59). Respondent then ordered the Board of probation and Parole to prepare a sentencing assessment report. (Exhibit A, p. A6; Exhibit H, p. A58) On August 25, 2011, Respondent sentenced Relator to 15 years in the Department of Corrections (DOC) for the offense of child molestation in the first degree and five years for all three counts of statutory sodomy in the second degree. (Exhibit A, p. A2, A7; Exhibit B, p. A10; Exhibit I, pp. A65-A66) The sentences on the statutory sodomy Convictions were to run concurrently with each other but consecutively to the child molestation charge. (Exhibit A, p. A2, A7; Exhibit B, p. A10; Exhibit I, pp. A65-A66) Respondent retained jurisdiction under § 559.115 RSMo[2] (Exhibit Q, pp. A129 – A130) and placed Relator in the Sex Offenders Assessment Unit (SOAU). (Exhibit A, p. A3, A7; Exhibit I, pp. A65-A66; Exhibit L, p. A101) On December 13, 2011, the SOAU issued a report recommending that Relator be placed on probation. (Exhibit D, pp. A18-A25) On December 19, 2011, this report was faxed to the Court.[3] (Exhibit D, p. A18) On January 17, 2012, Respondent sent notice to the attorneys that a hearing would be held on January 19, 2012. (Exhibit A, p. A7) Respondent had made efforts for Relator to

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1 Neither of these charges make Relator ineligible for placement in the SOAU under § 559.115.8 RSMo.

2 All statutory references are from RSMo Supp. 2010.

3 This can be seen at the very top of the last page of the facsimile on page A25.

be present both in person and through the polycom system but was unsuccessful. (Exhibit A, p.A8; Exhibit I, pp. A68-A69) A hearing was held and Respondent determined that it would be an abuse of discretion to release Relator. (Exhibit A, p. A8; Exhibit I, pp. A79-A80) On January 23, 2012, counsel for Relator filed a motion with the Court to reconsider its decision, arguing that Respondent had lost jurisdiction on December 23, 2011. (Exhibit A, p. A8; Exhibit E, pp. A26-A28) A brief hearing was held on January 26, 2012 and Respondent announced he would take the motion under advisement. (Exhibit A, p. A8; Exhibit I, pp. A81-A87) On January 27, 2012, Respondent entered a docket entry saying that it believed that he had lost jurisdiction of the case as more than one hundred twenty days had passed since Relator had been delivered to the department of corrections. (Exhibit A, p. A8) Further, the docket entry also stated that it did not believe that Relator had completed a program as defined by § 559.115 and the case of *State ex rel. Mertens v. Brown*, 198 S.W.3d 616 (Mo. banc 2006) did not apply. (Exhibit A, p. A8) On February 1, 2012, counsel for relator filed another motion asking the Court to reconsider its decision arguing that Relator had in fact completed a program under 559.115 and that the proceedings of January 19, 2012 were a nullity. (Exhibit A, p. A8; Exhibit F, pp. A29-A30) On February 2, 2012, Respondent took up the motion and stated that § 559.115.2 applied to Relator's case and not § 559.115.3. (Exhibit I, pp. A88-A95) Counsel for Relator gave cases to Respondent for him to consider and Respondent stated he would take the motion under advisement. (Exhibit I, p. A95) On February 14, 2012, Respondent overruled Relator's motion. (Exhibit A, p. A9) On March 5, 2012, Relator filed a petition for a Writ of Mandamus

with the Missouri Court of Appeals, Southern District, which it denied on March 7, 2012. (Exhibit J, p. A97) On March 16, 2012, Relator filed a petition for a writ of mandamus with this Court, which it sustained on April 25, 2012.

POINT RELIED ON

Relator is entitled to a writ of mandamus ordering that Respondent, the Honorable Mark Orr, vacate his order of January 19, 2012 denying relator probation, and place him on probation, because at the time Respondent entered that order, Respondent had lost authority over Relator's case in that: (1) Respondent had placed Relator in the Sex Offender Assessment Unit (SOAU); (2) the SOAU is a one hundred twenty day program under § 559.115.3 RSMo and Respondent had sentenced Relator under § 559.115.3; (3) the Department of Corrections (DOC) had recommended Relator be placed on probation; (4) section 559.115.3 requires that when a defendant successfully completes a one hundred twenty day program, the trial court cannot deny him probation unless it conducts a hearing within ninety to one hundred twenty days of a defendant's sentence; and, (5) more than one hundred twenty days had passed since Relator's sentence when Respondent denied him probation.

Etenburn v. State, **341 S.W.3d 737 (Mo. App. S.D. 2011)**

State v. Acevedo, **339 S.W.3d 612 (Mo. App. S.D. 2011)**

State v. Withrow, **8 S.W.3d 75 (Mo. banc 1999)**

State ex rel. Mertens v. Brown, **198 S.W.3d 616 (Mo. banc 2006)**

Section 559.115 RSMo. (Supp. 2010

ARGUMENT

Relator is entitled to a writ of mandamus ordering that Respondent, the Honorable Mark Orr, vacate his order of January 19, 2012 denying relator probation, and place him on probation, because at the time Respondent entered that order, Respondent had lost authority over Relator's case in that: (1) Respondent had placed Relator in the Sex Offender Assessment Unit (SOAU); (2) the SOAU is a one hundred twenty day program under § 559.115.3 RSMo and Respondent had sentenced Relator under § 559.115.3; (3) the Department of Corrections (DOC) had recommended Relator be placed on probation; (4) section 559.115.3 requires that when a defendant successfully completes a one hundred twenty day program, the trial court cannot deny him probation unless it conducts a hearing within ninety to one hundred twenty days of a defendant's sentence; and, (5) more than one hundred twenty days had passed since Relator's sentence when Respondent denied him probation.

"Mandamus is a discretionary writ that is appropriate where a Court has exceeded its jurisdiction or authority and where there is no remedy through appeal." *State ex rel. Poucher v. Vincent*, 258 S.W.3d 62, 64 (Mo. banc 2008)(quoting *State ex rel. Kauble v. Hartenbach*, 216 S.W.3d 158, 159 (Mo. banc 2007)). A writ of mandamus is also appropriate "to compel a Court to do what it is obligated by law to do and to *undo* that which the Court was by law prohibited from doing." *State ex rel. Schnuck Markets, Inc. v. Koehr*, 859 S.W.2d 696, 698 (Mo. banc 1993). Although ordinarily mandamus is the proper remedy to compel the discharge of ministerial functions and not to control the

exercise of discretionary powers, "[i]f, as a matter of law, the action of respondent is wrong, then he has abused any discretion which he may have had." *State ex rel. Mertens v. Brown*, 198 S.W.3d 616, 618 (Mo. banc 2006). (Exhibit M, pp. A103 – A106)

Section 559.115.3 requires a defendant to be released on probation upon successful completion of a Department of Corrections one hundred twenty day program unless the Court holds a hearing within one hundred twenty days of a defendant's *sentence* and makes a finding that releasing defendant would be an abuse of discretion. When a Court has failed to timely hold a hearing pursuant to § 559.115.3, the appropriate remedy is the entry of an order releasing the offender on probation. *State ex rel. Mertens v. Brown*, 198 S.W.3d at 618-619. In this case, Respondent sentenced Relator on August 25, 201, and placed him in the SOAU. (Exhibit I, pp. A65-A66) The SOAU issued a report stating Relator had successfully completed the program and recommended his release. (Exhibit D, pp. A18-A25) Respondent failed to hold a hearing within one hundred twenty days of Relator's sentencing. After December 23, 2011, Respondent lost authority over Relator's case and could only place Relator on probation. Thus, Respondent exceeded his authority when he denied Relator probation and executed his sentence on January 19, 2012, and the proceedings from that date are a nullity. Since Relator entered a guilty plea, he has no remedy through an appeal and cannot appeal the denial of probation after being sentenced under § 559.115. *State v. Ferrell*, 317 S.W.3d 688, 689 (Mo. App. S.D. 2010). Further, Relator may not seek relief under Rule 24.035. *Counts v. State*, 341S.W.3d 911, 913-914 (Mo. App. S.D. 2011). Moreover, a writ of habeas corpus is not available since "one circuit court has no supervisory authority over

another circuit court to order the correction of errors." *State ex rel. Mertens v. Brown*, 198 S.W.3d at 619. Therefore, a writ of mandamus from this Court is the appropriate remedy in Relator's case to undo Respondent's order of January 19, 2012 and to order Respondent to place Relator on probation.

"The standard of review for a writ of mandamus 'is abuse of discretion and abuse of discretion occurs where the circuit court fails to follow applicable statutes.'" *State ex rel. Unnerstall v. Berekemeyer*, 298 S.W.3d 513, 517 (Mo. banc 2009)(quoting *State ex rel. City of Jennings v. Riley*, 236 S.W.3d 630, 631 (Mo. banc 2007)).

Respondent, in his docket entry of January 27, 2012, stated that Relator did not complete a "program" as defined by § 559.115 (Exhibit A, p. A8) Further, at the hearing on February 2, 2012, Respondent stated that § 559.115.2 applied to Relator's case rather than §559.115.3 and thus the starting date of the one hundred twenty days was the day Relator arrived at DOC, and not the day he was sentenced. (Exhibit I, pp. A90-A95) Relator respectfully submits that the SOAU is a one hundred twenty day program as defined by § 559.115 and therefore § 559.115.3 applies to Relator's case and the start of the one hundred twenty days is the day of his sentence and not the day he arrived at DOC. By holding that the SOAU is not a one hundred twenty day program under § 559.115 and that § 559.115.2 applies to Relator's case rather than § 559.115.3, Respondent has failed to follow the statute and has abused his discretion. A writ of mandamus from this Court is the appropriate remedy.

This Court's decision to issue a writ of mandamus will depend upon the interpretation of a statute and its review of the statute's meaning will be *de novo.* *State ex rel. Unnerstall v. Berekemeyer,* 298 S.W.3d at 517.

SOAU IS A ONE HUNDRED TWENTY DAY PROGRAM UNDER SECTION 559.115 RSMo.

A plain reading of the statute shows that the SOAU is a program defined by 559.115.3. Section 559.115.3 specifically states:

> The Court may recommend placement of an offender in a department of corrections one hundred twenty-day program. Upon the recommendation of the Court, the department of corrections shall determine the offender's eligibility for the program, the nature, intensity, and duration of any offender's participation in a program and the availability of space for an offender in *any* program. (emphasis added) When the Court recommends and receives placement of an offender in a department of corrections one hundred twenty-day program, the offender shall be released on probation if the department of corrections determines that the offender has successfully completed the program except as follows. Upon successful completion of a treatment program, the board of probation and parole shall advise the sentencing court of an offender's probationary release date

thirty days prior to release. The court shall release the offender unless such release constitutes an abuse of discretion. If the court determined that there is an abuse of discretion, the court may order the execution of the offender's sentence only after conducting a hearing on the matter within ninety to one hundred twenty days of the offender's sentence. If the court does not respond when an offender successfully completes the program, the offender shall be released on probation. Upon successful completion of a shock incarceration program, the board of probation and parole shall advise the sentencing court of an offender's release date thirty days prior to release. The court shall follow the recommendation of the department unless the court determines that probation is not appropriate. If the court determines that probation is not appropriate, the court may order the execution of the offender's sentence only after conducting a hearing on the matter within ninety to one hundred twenty days of the offender's sentence. If the department determines that an offender is not successful in a program, then after one hundred days of incarceration the circuit court shall receive from the department of corrections a report on the offender's participation in the program and

> department recommendations for terms and conditions of an offender's probation. The court shall then release the offender on probation or order the offender to remain in the department to serve the sentence imposed.

In construing the language used in a statute, Courts "examine the language used in the statute according to its plain and ordinary meaning." *State v. Acevedo*, 339 S.W.3d 612, 617 (Mo. App. S.D. 2011). Further, Courts "look to whether the language is clear and plain to a person of ordinary intelligence." *Id.* If the language used in the statute is clear, Courts "must give effect to the statute as written." *Id*

The SOAU is a one hundred twenty-day program. Offenders in the SOAU are assessed in DOC and are there for one hundred twenty-days. Page 31 of the Sentencing Advisory Commission User Guide discusses the SOAU, refers to it as a program, and discusses it in conjunction with other one hundred twenty-day programs under § 559.115.[4] (Exhibit K, pp. A98-A99) Further, the DOC description of the SOAU specifically states:

> The Sex Offender Assessment Unit (SOAU) at Farmington Correctional Center is a *one hundred twenty-day residential program* that was established in FY '94. It is designed to assess community risks and sex offender treatment needs. Information is then shared with the Court for

4 http://www.mosac.mo.gov/file.jsp?id=45512

> release considerations. During CY '08, 98 offenders were assessed for the Courts at the SOAU.[5] (emphasis added) (Exhibit G, p. A33)

Moreover, page 31 of the Sentencing Advisory Commission User Guide discusses the SOAU, refers to it as a program, and discusses it in conjunction with other one hundred twenty-day programs under § 559.115.[6] (Exhibit K, pp. 98-99)

Finally, Missouri case law also supports Relator's argument that the SOAU is a one hundred twenty day program. See for example, *State v. Bryan*, 335 S.W.3d 1, 3 (Mo. App. S.D. 2011); and, *Wilhite v. State*, 339 S.W.3d 573, 575 (Mo. App. W.D. 2011).[7] (Exhibit O, pp. A118 – A123; Exhibit P, pp. A124 – A128)

RELATOR WAS SENTENCED UNDER SECTION 559.115.3

The SOAU is a one hundred twenty-day program. One hundred twenty day programs are covered under 559.115.3. Therefore, the SOAU is covered under § 559.115.3. The language of the statute is clear and unambiguous. Even if there is ambiguity, that must be resolved in favor of Relator. *State v. Withrow*, 8 S.W.3d 75, 80 (Mo. banc 1999).

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5 http://doc.mo.gov/division_rehab.php

6 http://www.mosac.mo.gov/file.jsp?id=45512

7 These cases do not specifically state the SOAU is a 120 day under 559.115.3, but do lend support to Relator's argument.

Further, Relator respectfully submits that the case of *Etenburn v. State,* 341 S.W.3d 737 (Mo. App. S.D. 2011) (Exhibit N, pp. A107 – A117), strongly supports Relator's argument that he was indeed sentenced under § 559.115.3. In *Etenburn,* the defendant pled guilty to stealing, forgery, and possession of a controlled substance. *Id.* at 741. The trial Court sentenced him to 10 years on each case to be run consecutively. *Id.* The trial Court also sentenced him under § 559.115 under "general shock incarceration." *Id.* The defendant did not show up for sentencing and the trial Court amended its written judgment and ordered his sentences to be fully executed. *Id.* at 742-743. The defendant filed for post-conviction relief alleging that the trial Court did not have the authority to amend the judgment and that he was prejudiced by it. *Id.* at 744. The defendant's argument was that section 559.115.3 RSMo would have allowed him to have a chance at probation by successfully completing the shock incarceration program. *Id.* The Missouri Court of Appeals, Southern District, noted that the pronouncements of the trial court, "considered on their face in isolation from the rest of the record," were unclear as to whether § 559.115.2, which gave the trial court sole discretion to place defendant on probation, or § 559.115.3, which placed the defendant in the shock incarceration program, applied. *Id.* at 745. The Southern District then went on to explain that the way to resolve any confusion was to consider the entire record. *Id.* at 746. The Southern District concluded that the record in defendant's case showed that he was sentenced to general shock incarceration, and not the shock incarceration program and thus §559.115.2 applied. *Id.* In particular, the Southern District noted the absence of any mention of the

involvement of the board of probation and parole in giving any input on whether defendant should be released on probation. *Id.*

While the issue in Relator's case is one of statutory interpretation and not ambiguity in the pronouncement of the trial court, Relator respectfully submits that reviewing the entire record can resolve the dispute in his case as well. In this case, the record shows Respondent recommended placement of Relator in the SOAU one hundred twenty day program. (Exhibit B, p. A10; Exhibit H pp. A51-A53; Exhibit L, p. A101) Respondent ordered a sentencing assessment report to confirm eligibility. (Exhibit A, p. A6; Exhibit H, p. A58) The report found Relator was eligible for the program and Respondent placed Relator into the SOAU. (Exhibit C, p. A15; Exhibit I, pp. A65-A66) The SOAU's report, written by the board of probation and parole, indicated that Relator had successfully completed the program and recommended his release. (Exhibit D, p. A25) Respondent scheduled a hearing and one was held. (Exhibit A, pp. A7-A8; Exhibit I, pp. A68-A80) Respondent, using the language from 559.115.3, ruled he believed it would be an abuse of discretion to release Relator. (Exhibit A, p. A8; Exhibit I, pp. A79-A80) Thus, in Relator's case, the record clearly shows that Respondent followed the procedures outlined in 559.115.3, which apply to DOC one hundred twenty day programs, of which SOAU clearly is one. Further, the record in Relator's case clearly shows Respondent did not place him in general shock incarceration, which, as the *Entenburn* case shows, falls under § 559.115.2. By holding that 559.115.2 applied to Relator's case, Respondent incorrectly applied the statute and abused his discretion.

CONCLUSION

Respondent sentenced Relator to twenty years in DOC under § 559.115 and placed him the one hundred twenty day program of the SOAU. DOC issued a report stating that Relator successfully completed the program and recommended his release. Section 559.115.3 applies to placement in a DOC one hundred twenty program and specifically states that upon successful completion of a one hundred twenty day program, the trial Court can only deny an offender's release if it holds a hearing within one hundred twenty days of the offender's *sentence.* In this case, Respondent sentenced Relator on August 25, 2011. After December 23, 2011, Respondent lost authority over Relator's case. Thus, he had no jurisdiction to deny Relator probation on January 19, 2012 and incorrectly applied 559.115.2 in Relator's case. Respondent both exceeded his authority and abused his discretion and Mandamus is the appropriate remedy. Relator respectfully requests this Court issue a writ of mandamus ordering Respondent to set aside his order of January 19, 2012 and to place Relator on probation.

Respectfully submitted,

/s/ James Egan

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CERTIFICATE OF SERVICE

I, the undersigned counsel, hereby certify, that on this 2nd day of May, 2012, true and correct copies of the foregoing brief were personally delivered to the Hon. Mark Orr, Circuit Judge, 38th Judicial Circuit, 110 W. Elm, Room 205, Ozark, Missouri, 65721; Phone 417-581-2727; Fax 417-581-0091; E-Mail: Mark.Orr@courts.mo.gov; and, Mr. Jeff Merrell at the Taney County Prosecutor's Office, Taney County Judicial Center, 266 Main Street, Forsyth, Missouri 65653; Phone 417-546-7260; Fax 417-546-2376; E-Mail: JeffM@co.taney.mo.us.

/s/ James Egan

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James Egan

CERTIFICATE OF COMPLIANCE

I, James Egan, hereby certify as follows:

The attached brief complies with the limitations contained in this Court's Rule 84.06. The brief was completed using Microsoft Word, Office 2010, in Times New Roman size 13 point font. Excluding the cover page, signature block, this certification and the certificate of service, this brief contains 3,525 words, which does not exceed the 31,000 words allowed for a Relator's brief.

/s/ James Egan

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James C. Egan